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FEB 15 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030 RM-8029
	)	
Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

To: The Commission

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COMMENTS OF UTC

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Dated: February 15, 1996

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Summary

Many utilities, pipelines, and other public safety/public service providers are licensed to operate sophisticated land mobile radio systems in the 800 MHz band. Before the Commission's actions in this docket, these private system licensees had access to 600 channels in the 800 MHz band; today, these entities have access to a total of 170 channels, and with restrictions on intercategory sharing, even fewer channels are available to any given applicant, depending on specific radio service eligibility. For these and other reasons, UTC strenuously objects to the FCC's decision to reallocate the General Category for commercial use, and intends to address this matter in a separate Petition for Reconsideration in this docket.

In these Comments, however, UTC will address the issues relating to protection for incumbent systems operating in the bands that are scheduled or proposed to be auctioned to Economic Area (EA) licensees. Many non-commercial systems are currently licensed in both the upper 200 SMR channels as well as the General Category and lower 80 SMR channels due to unavailability of channels within the licensees' own service categories. UTC therefore has an interest in ensuring that these incumbents are treated fairly, and that their radio systems, which are used for safety of life and property applications, are adequately protected.

UTC supports the FCC's proposal to require EA licensees to share the costs of relocating incumbents. A cost-sharing mechanism will encourage coordinated relocation

of integrated incumbent systems and will streamline the negotiation and relocation process. UTC also supports the use of alternative dispute resolution (ADR) to resolve disagreements over relocation and reimbursement during the mandatory period. Use of ADR during the voluntary period should be encouraged, but due to the nature of this period as a voluntary negotiation period, ADR should not be required.

UTC generally concurs with the FCC's proposed definition of "comparable facilities." However, because of the unique nature of simulcast radio systems which require the same channels to be present at all sites in the system, UTC urges the FCC to require that, for purposes of comparability, an EA licensee must obtain the same replacement frequencies for all sites within an incumbent's simulcast network.

UTC disagrees with the FCC's proposal for a one-sided definition of "good faith." Instead of presuming that any offer by an EA licensee is a "good faith" offer, and that any rejection of such an offer is "bad faith" on the part of the incumbent, the term "good faith" should be defined by reference to its common sense, everyday business meaning: an honest belief, the absence of malice and the absence of design to defraud or seek an unconscionable advantage. Good faith should include an obligation by both parties to meet, exchange views, honor reasonable requests for information and give serious consideration to offers in a timely manner; it should not be defined in a way that would negate the very concept of "negotiation."

Trade-offs among system parameters in order to achieve comparability should be permitted, but only if these trade-offs are acceptable to the incumbent.

Reallocation of the General Category to commercial use is patently unfair to the non-commercial licensees who have been compelled to use this band in building out their internal-use networks. Moreover, the FCC's proposal to restrict further eligibility of this spectrum to "small businesses" will mean that many incumbents will not even be permitted to bid at auction for this spectrum, even if they were willing and able to do so.

Non-SMR incumbents in the General Category and lower 80 SMR channels should be entitled to at least the same protections and rights as SMR incumbents licensed in this spectrum, including the right to remain without mandatory relocation and the right to make system modifications so long as the 22 dBu interference contour is not expanded.

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To: The Commission

COMMENTS OF UTC

Pursuant to Section 1.415 of the Federal Communications Commission's (FCC) Rules, UTC, The Telecommunications Association (UTC),[1] hereby submits its comments in response to the *Second Further Notice of Proposed Rule Making* (*Second FNPRM*) in the above-captioned proceeding.[2]

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[1] UTC was formerly known as the Utilities Telecommunications Council.

[2] On January 16, 1996, the FCC's Commercial Wireless Division released an *Order*, DA 96-18, extending the comment and reply comment dates in this proceeding to February 15, 1996 and March 1, 1996 respectively.

UTC is the national representative on communications matters for the nation's electric, gas, and water utilities, and natural gas pipelines. Over 1,000 such entities are members of UTC, ranging in size from large combination electric-gas-water utilities which serve millions of customers, to smaller, rural electric cooperatives and water districts which serve only a few thousand customers each. All utilities and pipelines depend upon reliable and secure communications to assist them in carrying out their public service obligations, and many operate extensive private land mobile communications systems in the 800 MHz spectrum which is the subject of this proceeding. Accordingly, UTC is pleased to offer the following comments.

I. Reallocation of General Category is Ill-advised

The *Second FNPRM* is part of a series of on-going proceedings to establish service rules and auction procedures for the licensing of Specialized Mobile Radio (SMR) systems in the 800 MHz band. As a preliminary and fundamental matter, UTC wishes to express its adamant opposition to an underlying aspect of the *Second FNPRM.* Specifically, UTC objects to the consideration of auction rules and procedures for the General Category channels in the 800 MHz band. In the companion *First Report and Order and Eighth Report and Order* (*First R&O/Eighth R&O*) that accompanied the *Second FNPRM* the Commission reallocated the General Category channels from their historic designation as frequencies that were available for licensing by both private and commercial radio systems to being exclusively available to SMRs. While UTC intends to more fully address this decision in a separate "Petition for Reconsideration," the interrelated nature of the subject matter combined with the Commission's failure to publish the *First R&O/Eighth R&O* in a timely manner,[3] necessitates that this issue be raised in this proceeding.

Utilities and pipelines rely on private land mobile radio systems in the 800 MHz band to support critical public safety/public service functions. These systems are used to enhance coordinated responses to emergency situations such as power outages, natural gas leaks and natural disasters. As a general matter, utilities and pipelines request licensing in the Industrial/Land Transportation (I/LT) category at 800 MHz. However, I/LT channels are exhausted in many areas of the country due to the voracious channel appetite of speculative commercial radio operators. As a result many of these private system users have had to turn to the General Category channels for relief in implementing their essential systems.

The Commission did not provide a detailed or reasoned basis to support a wholesale reallocation of the General Category channels to commercial services. Instead, the FCC relied on a facile count of license records to support its conclusion that "the demand for additional spectrum by SMR providers is significantly greater than the demand by non-SMRs."[4] UTC disagrees with the assumption that channel counts are a fair indication of demand, or that channel counts are a proper means to assess the public

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[3] As of this filing, 60 days have lapsed since the adoption of the First R&O/Eighth R&O) and there has been formal notice in the Federal Register.

[4] *First R&O and Eighth R&O*, para.137 .

interests in reallocating channels for commercial use that are also needed to meet the internal communications requirements of public safety/public service users. Comparing the number of commercial and non-commercial license grants in the General Category does not accurately depict demand but instead reflects the different licensing policies that the FCC has adopted for commercial systems compared to private systems. Under the liberal licensing policies that the Commission has had in place for commercial mobile radio operators, SMRs could request as many channels as they wanted on a speculative basis without regard to a demonstration of actual need. In contrast, private internal users such as utilities are required by Commission rules to justify the number of channels requested on the basis of near-term loading requirements. Given these two widely differing licensing policies it is axiomatic that Commission licensing records will indicate that SMRs are licensed on more channels than private non-commercial users, but these records do not indicate actual demand or system usage, nor do license counts necessarily reflect the public interest in allocating additional spectrum for commercial use at the expense of public safety/public service.

The General Category was intended to serve as a "safety valve" for all radio services that would be available when channels could not be obtained in the applicant's own category. Many utilities routinely require access to General Category channels because the frequencies in their own pool have been exhausted. Ironically, the lack of available channels in the private categories is often the result of speculative filings by

SMRs in non-SMR categories through the use of the Commission's intercategory sharing rules. Given the fact that it is the Commission's past SMR licensing practices that has necessitated private licensees to resort to the General Category channels, it is particularly inequitable to now arbitrarily designate the General Category channels as exclusively "commercial" channels as this will deprive non-commercial licensees of an important resource in developing and maintaining their critical communications networks.

Finally, the Commission's rationale that it needs to designate the General Category channels as SMR-only in order to provide a relocation home for incumbents in the upper portion of the 800 MHz band ignores the fact that not all of the incumbents that will need to be relocated are SMRs. There are a number of utilities, pipelines and other private users that are licensed in the upper 800 MHz channels and they too will need access to the General Category channels as a relocation home. Until the FCC identifies additional spectrum to accommodate displaced private systems as well new private systems a reallocation of the General Category channels is ill-advised.

II. Proposed Rules

A. Mandatory Relocation From Upper 200 Channels

In order to accommodate new Economic Area (EA) licensees in the upper portion of the 800 MHz band without disrupting the operations of incumbents, the Commission has adopted a two phase relocation process. The first phase is a one-year period for voluntary negotiations. During this voluntary period, the EA licensee and incumbents may negotiate any mutually agreeable relocation agreement. If no agreement is reached between the EA licensee and incumbent during the first phase, the EA licensee may initiate a two-year mandatory negotiation period, during which the parties are to negotiate in "good faith." If at the end of the mandatory negotiation period the parties are still unable to reach an agreement the EA licensee may request involuntary relocation of the incumbent's system. In such case, the EA licensee must bear all relocation costs of moving the incumbent to comparable replacement facilities.[5]

UTC supports the adopted relocation process as the most efficient and equitable means to balance the incumbents' interests in maintaining system integrity with EA licensees' ability to offer service. In particular, UTC supports the Commission's requirement that the EA licensees notify incumbent operators in their spectrum block within 90 days of the release of the Public Notice commencing the voluntary negotiation period of their intention to relocate the incumbents . If an incumbent does not receive timely notification of relocation, the EA licensee loses the right to require the incumbent to relocate.[6]

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[5] *First R&O*, para. 78.

[6] One of the difficulties in the relocation program that has been adopted for the 2 GHz band is the lack of any ability, on the part of the incumbents, to compel the initiation of relocation negotiations. Under the rules adopted in ET Docket No. 92-9, only the "emerging technology" licensee may compel the initiation of negotiations, with the result that most incumbents in the 2 GHz band are still waiting to be contacted, and have no idea if, when or how they will be relocated. Imposing a notification requirement on the auction winner would facilitate system planning on the part of the incumbents, and would result in a more orderly transition process.

While the Commission adopted the above framework for the relocation process in the *First R&O,* the *Second FNPRM* seeks further input on specific aspects of the relocation procedure, ranging from the creation of a cost-sharing mechanism, to the definition of comparable facilities. Below, UTC addresses these issues.

1. UTC Agrees With Proposal To Require EA Licensees To Share Costs of Relocating Incumbents

In the *Second FNPRM*, the Commission proposes to adopt a cost-sharing mechanism under which EA licensees that relocate portions of incumbent systems outside their license blocks may seek reimbursement from the other EA licensees that benefit from the relocation. UTC supports the adoption of such a cost-sharing mechanism in order to promote a more orderly transition of incumbent systems. A cost-sharing mechanism will encourage the coordinated relocation of large integrated incumbent systems, streamline the negotiation process, and add a degree of certainty over reimbursement costs for both the EA and incumbent licensees.

UTC agrees with the FCC proposal to require the EA licensees to share the relocation costs on a pro rata basis, based on the number of the incumbent's channels located in the EA licensees' respective spectrum blocks, unless the EA licensees agree to a different cost-sharing allocation. Such a plan is appropriate given the fact that under the FCC's rules an incumbent licensee may compel all EA licensees in whose spectrum blocks it operates to collectively negotiate the incumbent's relocation. As a result of this coordinated approach to system-wide relocations, determining each party's cost-sharing obligation should in most cases be relatively straight forward.

2. ADR Should Be Used To Resolve Disputes Over Relocation

UTC supports the use of alternative dispute resolution (ADR) procedures to resolve disagreements between EA licensees and incumbents over the terms and conditions of relocation and reimbursement during the mandatory negotiation period. ADR will allow the parties to resolve disputes without having to resort to the time consuming and costly expense of formal adjudicatory procedures. Further, ADR will help to minimize Commission involvement in individual relocation.

While UTC supports the use of ADR during the mandatory negotiation period, UTC believes the FCC should encourage, but not require use of ADR during the voluntary negotiation stage of the relocation process. In adopting the relocation rules in the *First R&O* the Commission clearly stated that during the one-year voluntary period "negotiations are strictly voluntary and are not defined by <u>any</u> parameters."[7] It would therefore be inconsistent to <u>require</u> incumbents to submit to ADR to resolve disagreements over issues about which they are not even compelled to negotiate.

Finally, UTC opposes the suggestion that industry trade associations be designated as arbiters of disputes between incumbents and EA licensees. The existing industry trade associations do not have any specific skill or expertise in ADR procedures. More

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[7] *First R&O*, para.77 (emphasis added).

importantly, the use of industry trade associations would render the process susceptible to conflict of interest considerations. Indeed, based on press reports and recent filings, there already appears to be a small scale war going on between the various associations purporting to represent the SMR industry between their large and small members. The hallmark of effective ADR is impartiality on the part of the arbiter. UTC supports the use of independent neutral third parties to act as arbiters unless the individual parties agree otherwise.[8]

3. Comparable Facilities

The relocation rules require EA licensees to provide incumbents with "comparable facilities" as a condition for involuntary relocation. As part of the *Second FNPRM* the Commission proposes to clarify factors that it would look to in determining comparability. Specifically the FCC proposes that comparable facilities would at a minimum provide the incumbent with: (1) the same number of channels with the same bandwidth as its existing system; (2) relocation of the entire system; and (3) a new 40 dBu service contour that encompasses all of the territory covered by the 40 dBu contour of the incumbent's original system. UTC generally concurs with the FCC's proposed definition.

In addition to requiring system-wide relocations, UTC urges that the rules specifically recognize the unique operational requirements of "simulcast" systems. Many

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[8] With regard to the use of the FCC's Compliance and Information Bureau, UTC has no doubt about its impartiality but questions whether this is the best use of Commission resources at a time of shrinking budgets and calls for administrative streamlining.

utilities operate closely-coordinated and integrated simulcast systems that employ the same frequencies at every site in the network. In this way, utilities can effectively communicate with all personnel or discrete work groups depending on the specific project. Under a utility simulcast system, no individual site can have a frequency replaced with another without requiring the same frequency being installed at all of the other sites on the network. Without a system-wide replacement of the frequency, the system will not function properly. The FCC's rules must therefore require that for purposes of comparability, an EA licensee must obtain the same replacement frequencies for all sites within an incumbent's simulcast network.

4. The Good Faith Requirement Should Not Substantively Impact The Ability Of The Parties To Negotiate During The Mandatory Negotiation Period

Under the "mandatory negotiation" phase of the relocation rules there is an obligation for the parties to negotiate in "good faith." The Commission has indicated its belief that additional clarification of the term "good faith" will facilitate negotiations. UTC agrees. However, UTC does not believe that the clarification should be used to restrict the ability of the incumbent to engage in actual negotiations.

Specifically, UTC opposes the Commission's suggestion that an incumbent's failure to accept an offer of comparable facilities would create a rebuttable presumption that the incumbent is not acting in good faith. Such a presumption is tantamount to equating good faith to an obligation to accept whatever the EA licensee considers to be comparable facilities on a take-it-or-suffer-the-consequences basis.[9] In addition to being one-sided, such a definition begs the question of what constitutes "comparable facilities." As discussed above, the Commission is not proposing a rigid definition but instead is proposing guidelines regarding what would constitute comparable facilities.

Tying good faith to the acceptance of an EA licensee's offer of comparable facilities would undermine the Commission's stated intention that the parties actually negotiate and mutually agree on what constitutes comparable replacement facilities. The Commission's proposal to base the determination of good faith or bad faith solely on the acceptance of a relocation offer is grounded on the flawed assumption that "expansive" negotiations will have taken place during the voluntary negotiation period and that "by the time the parties have reached the mandatory negotiation period only the bare essentials of comparability should be required."[10] The one-year voluntary negotiation period is a fixed period of time that expires on a date certain. Although the Commission's rules require that within 90 days of the start of the voluntary negotiation period all EA licensees contact incumbents within their license block of their intention to relocate them, this obligation does not require the EA licensees to in fact commence negotiations at any particular time. Therefore, in many areas of the country, particularly rural regions, EA licensees may not need to relocate incumbents during the initial year after licensing that is considered the

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[9] While presumably the presumption of bad faith could be overturned by the Commission or an independent arbiter, this would needlessly and prematurely involve a third-party in the negotiation process.
[10] *Second FNPRM*, para. 286.

voluntary negotiation period. Accordingly, the FCC should not undercut the ability of incumbents to actually engage in negotiations over their own replacement facilities.

The term "good faith" is meant to govern the conduct of <u>negotiations</u> during the mandatory <u>negotiation</u> period. It is not meant to substantively restrict either party's ability to negotiate over replacement facilities. The term good faith should therefore be given its common sense everyday business meaning: an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.[11] In addition to these general requirements in the context of replacement negotiations good faith should also encompass an obligation between the parties to meet, exchange views, honor reasonable requests for information, and give serious consideration to offers in a timely manner. Rejection of offers through the tendering of counteroffers should not be considered "bad faith," as implied by the proposed rules.

5. Tradeoffs Should Be Purely At The Discretion <u>Of The Incumbent</u>

UTC seeks clarification that in proposing a flexible definition of comparability in which the parties are free to "trade-off" system parameters, the FCC is not suggesting that an EA licensee could unilaterally "trade-off" system parameters in order to achieve comparable replacement facilities. Arbitrary trading-off of system components is at odds with the fundamental premise of the Commission's replacement plan -- an incumbent will receive replacement facilities that are equal or superior to its existing system. In the case

[11] *Black's Law Dictionary*, Fifth Edition.

of utilities and pipelines, incumbent systems have been individually designed and engineered to meet a multitude of specialized purposes. EA licensees do not have sufficient knowledge or expertise regarding the incumbent's operational requirements to dictate appropriate trade-offs. Unless the EA licensees are willing to assume the liability of missed communications during the restoration of downed electrical lines or damaged pipelines, it is unreasonable to allow these entities to substitute their judgment for that of the incumbents. Trade-offs should only be allowed at the option of the incumbents.

B. Licensing of General Category Channels

As stated above, UTC emphatically objects to a reallocation of the General Category channels to SMR-only licensing. An examination of the proposed licensing rules points out the inequities of the Commission's action. For example, the FCC proposes to auction all future licenses for this spectrum, yet it is heavily relied upon by private internal-use radio systems for whom auctions are impractical.

Unlike commercial entities that use spectrum to generate revenue, utilities, pipelines, and public safety entities use radio spectrum as integral tool to their offering of safe and reliable service to the public. These entities are often heavily regulated with regard to the expenditure of ratepayer or taxpayer funds and are not in a position to attempt to outbid commercial entities for the use of radio spectrum. Moreover, utility and pipeline operational requirements are constantly evolving, and their communications requirements may not correspond to the rigid timetable of auctions. Similarly, utilities and pipelines license their communications systems on the basis of their underlying service territories which do not necessarily have any relation to the proposed geographic licensing areas of EAs. The build-out requirements would therefore impose an unnecessary and spectrally inefficient burden on these entities.

The Commission's proposal to classify the General Category channels as an "Entrepreneurs Block" would further compound the unfairness of the reallocation of these channels for commercial service. Under the FCC's proposal, eligibility for the General Category Channels would be restricted to "small businesses" which the FCC is proposing to define as being in the range of $3 million in gross annual revenues over the past three years. This proposal would add insult to injury by saying in effect to utilities, and pipelines and many other incumbents that even assuming you were willing and able to go through auctions, you are still ineligible for the General Category frequencies because your gross revenues exceed the small business cap.[12]

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[12] UTC notes and supports the Commission's proposal to allow auction winners in the lower 80 SMR channels to partition and disaggregate their licenses as this may offer a measure of relief for incumbents and others to purchase a portion of spectrum to help meet their needs in the aftermarket of auctions. However, at best this is only a partial solution because there is no guarantee that the auction winners will be willing to partition or disaggregate portions of their license.

C. Treatment of Incumbents In General Category And Lower 80 SMR Channels

Under the Commission's proposal for treatment of incumbents in the General Category and lower 80 SMR channels, the FCC has tentatively concluded that there should be no mandatory relocation of incumbent SMRs since there are no suitable replacement channels. UTC supports this tentative conclusion and urges the Commission to apply the same logic to the treatment of incumbent non-SMRs in the General Category and lower 80 SMR channels. The vast majority of these entities are licensed on these frequencies precisely because there were no channels available in the designated non-SMR spectrum. These non-SMR incumbents should be afforded at least the same rights as incumbent SMRs. Specifically, SMR and non-SMR incumbent licensees should be allowed to continue to operate under their existing site-specific authorizations. In addition, all incumbent licensees should be able to modify or add transmitters in their existing service area without prior notification to the Commission, so long as their 22 dBu interference contour is not expanded.

III. Conclusion

Many utilities, pipelines, and other public safety/public service providers are licensed to operate sophisticated land mobile radio systems in the 800 MHz band. Before the Commission's actions in this docket, these private system licensees had access to 600 channels in the 800 MHz band; today, these entities have access to a total of 170 channels. and with restrictions on intercategory sharing, even fewer channels are available to any given applicant, depending on specific radio service eligibility. For these and other reasons, UTC strenuously objects to the FCC's decision to reallocate the General Category for commercial use, and intends to address this matter in a separate Petition for Reconsideration in this docket.

Many non-commercial systems are currently licensed in both the upper 200 SMR channels as well as the General Category and lower 80 SMR channels due to unavailability of channels within the licensees' own service categories. UTC therefore has an interest in ensuring that these incumbents are treated fairly, and that their radio systems, which are used for safety of life and property applications, are adequately protected.

UTC supports the FCC's proposal to require EA licensees to share the costs of relocating incumbents. A cost-sharing mechanism will encourage coordinated relocation of integrated incumbent systems and will streamline the negotiation and relocation process. UTC also supports the use of alternative dispute resolution (ADR) to resolve disagreements over relocation and reimbursement during the mandatory period. Use of

ADR during the voluntary period should be encouraged, but due to the nature of this period as a voluntary negotiation period, ADR should not be required.

UTC generally concurs with the FCC's proposed definition of "comparable facilities." However, because of the unique nature of simulcast radio systems which require the same channels to be present at all sites in the system, UTC urges the FCC to require that, for purposes of comparability, an EA licensee must obtain the same replacement frequencies for all sites within an incumbent's simulcast network.

UTC disagrees with the FCC's proposal for a one-sided definition of "good faith." Instead of presuming that any offer by an EA licensee is a "good faith" offer, and that any rejection of such an offer is "bad faith" on the part of the incumbent, the term "good faith" should be defined by reference to its common sense, everyday business meaning: an honest belief, the absence of malice and the absence of design to defraud or seek an unconscionable advantage. Good faith should include an obligation by both parties to meet, exchange views, honor reasonable requests for information and give serious consideration to offers in a timely manner; it should not be defined in a way that would negate the very concept of "negotiation."

Trade-offs among system parameters in order to achieve comparability should be permitted, but only if these trade-offs are acceptable to the incumbent.

Reallocation of the General Category to commercial use is patently unfair to the non-commercial licensees who have been compelled to use this band in building out their internal-use networks. Moreover, the FCC's proposal to restrict further eligibility of this spectrum to "small businesses" will mean that many incumbents will not even be permitted to bid at auction for this spectrum, even if they were willing and able to do so.

Non-SMR incumbents in the General Category and lower 80 SMR channels should be entitled to at least the same protections and rights as SMR incumbents licensed in this spectrum, including the right to remain without mandatory relocation and the right to make system modifications so long as the 22 dBu interference contour is not expanded.

WHEREFORE, THE PREMISES CONSIDERED, UTC requests the Federal Communications Commission to take action in accordance with the views expressed in these comments.

Respectfully submitted,

UTC

By:

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Dated: February 15, 1996

CERTIFICATE OF SERVICE

I, John Lanou, legal assistant of UTC, The Telecommunications Association, hereby certify that I have caused to be sent, by hand-delivery, on this 15th day of February, a copy of the foregoing to each of the following:

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